

1       one admitted relationship, but I thought you were telling  
2       me that they admitted more than one, relationships  
3       plural.

4                    MR. GUTKOSKI: They admit relationships with  
5       unnamed supermarket chains. You have to understand the  
6       way the factual record before your Honor developed.  
7       Sensitech was able through customers to identify these  
8       letters, much as the one you went over with my opposing  
9       counsel, that listed the supermarket chains that make  
10      these available. We made those allegations based -- the  
11      allegations about these supermarket chains based upon  
12      TNT's own documents. TNT's response was to say, of those  
13      five that you list, Big Y, Shaw's, C & S, Alphas Chelsea,  
14      we admit that we had a relationship -- had relationships  
15      regarding these infringing products over the last six  
16      years such that at least 2300 monitors have worked, they  
17      say indirectly, here to Massachusetts. And they further  
18      admit 700 of them went to Shaw's alone.

19                   THE COURT: Where is that?

20                   MR. GUTKOSKI: The 700 number, your Honor, is  
21      -- it's in their reply brief at between pages 6 and 8,  
22      your Honor. I'm looking forward to Mr. Pohle's  
23      declarations. It's on page 7 in the reply brief.

24                   MR. CISLO: Paragraph 19.

25                   MR. GUTKOSKI: Paragraph 19, page 7, thank you,

1       of Mr. Pohle's affidavit, determined that 700 of those  
2       recorders in the applicable period ended up at Shaw's.

3                 THE COURT: And is Shaw's exclusively in  
4       Massachusetts? Let me put it this way. Well, actually,  
5       I don't remember. About 30 years ago, I represented  
6       Shaw's on a matter. I mean, Shaw's is not just in  
7       Massachusetts.

8                 MR. GUTKOSKI: I don't know, your Honor.

9       However --

10                THE COURT: I know. I mean, I have to decide  
11       based on the record, but I've been in a Shaw's in  
12       Vermont.

13                MR. GUTKOSKI: The representation they have  
14       made, their admitted representation is 2300 units ended  
15       up in Massachusetts, and 700 of those 2300 ended up at  
16       Shaw's. So, from their own admission, that 700 are  
17       Massachusetts monitors that ended up in Massachusetts.  
18       That's in addition, your Honor, to the previous admission  
19       they made, which was of \$9400 worth of direct sales not  
20       through what they characterize as indirect sales through  
21       growers here, but \$9400 of direct sales to customers here  
22       in Massachusetts. Mr. Pohle in his declarations also  
23       admits that. So the question of personal jurisdiction --

24                THE COURT: Actually, if the 9400 -- I thought  
25       your best argument is for specific jurisdiction arising

1 out of the transaction of business in Massachusetts.

2 MR. GUTKOSKI: Yes.

3 THE COURT: And I haven't done it in this case,  
4 but I've done it in at least one other case many years  
5 ago, had to look at the personal jurisdiction issues that  
6 emerge from having a Web site, and they're complicated.  
7 But I thought your best shot was on specific  
8 jurisdiction, that they had this relationship with Alpha,  
9 at least. And I actually thought that was enough to get  
10 you personal jurisdiction, given the standard at the  
11 outset of the case.

12 MR. GUTKOSKI: We agree, your Honor. And not  
13 only is it those initial contacts when the monitors come  
14 into the state, but you have to recognize the way these  
15 things are operating. You have to recognize the fact  
16 that the supermarkets take them. They use them. They  
17 download the information. What's happened to this load  
18 of squash or cabbage or what have you that's come into  
19 Massachusetts, they then take and download that  
20 information. In many cases, TNT admits they send that  
21 information to TNT, and TNT maintains it for those  
22 Massachusetts customers for two years. TNT allows the  
23 software to read those monitors to be downloaded by its  
24 Massachusetts supermarket customers here in the  
25 Commonwealth.

1                   The supermarket chains then take those monitors,  
2                   ship them back to TNT for a rebate. TNT sends a check  
3                   from California back to the supermarkets here in  
4                   Massachusetts.

5                   Each of those transactions involving each of one  
6                   of those monitors is a separate contact. So it's not  
7                   just a one-time sale as in a retail operation where it  
8                   ends up somewhere, somebody goes into the store and buys  
9                   it. We're talking about an ongoing relationship.

10                  So, again, your Honor, for all of those reasons,  
11                  we believe it's specific jurisdiction because all these  
12                  contacts relate to the accused products, and there's been  
13                  no question that they do. They are admitted that they  
14                  do. And, therefore, we believe personal jurisdiction is  
15                  more than solid here.

16                  Turning to the court's concern about venue, the  
17                  court has noted that the allegations about -- made by Mr.  
18                  Pohle regarding the negotiations back and forth between  
19                  Sensitech and TNT, correspondence, the allegations Mr.  
20                  Pohle makes about statements made by the CEO of Sensitech  
21                  go unaddressed. They're unaddressed, your Honor, because  
22                  they are not relevant to the question of jurisdiction or  
23                  venue. This is a patent case. The defendants haven't  
24                  been answered yet. We assume that they're going to  
25                  allege standard patent defenses of invalidity,

1        unenforceability, et cetera, as my brother counsel has  
2        referenced here today.

3              The issue here, however, on the pleadings so far  
4        before the court is infringement. The question of  
5        infringement is going to turn on comparing the accused  
6        devices, these temperature monitors of TNT, to the  
7        patents and the related defenses to that.

8              As Mr. Cislo has pointed out, they raised  
9        questions about asserting the reissue patents and not the  
10       main patents, asserting how the reissue came about, what  
11       was told to the Patent Office. All of that information  
12       is going to be testified to about by Massachusetts  
13       witnesses. All of the inventors, save one, are located  
14       here in Massachusetts.

15             THE COURT: What issues are there even going to  
16       be testimony on? In other words -- I don't have an  
17       answer yet, but in terms of interpreting the patent, it's  
18       only in rare cases that I would look at extrinsic  
19       evidence.

20             MR. GUTKOSKI: In which case we're talking  
21       about lawyer arguments, and it's not a matter of whether  
22       there are folks in California or folks in Massachusetts.

23             In terms of what was told to the Patent Office,  
24       issues of unenforceability relate to the duty of candor  
25       and whether or not the inventors and their prosecuting

1       attorneys divulged all the information that they were  
2       aware of to the Patent Office. That's going to be  
3       involved, discovery and testimony from the prosecuting  
4       counsel here in Massachusetts, the inventors here in  
5       Massachusetts, except for one who's in Maine. All of  
6       those witnesses, obviously, it's much more convenient for  
7       them to be involved in the litigation and to appear  
8       before the court here in Massachusetts than in  
9       California.

10                  The only other potential defense relates to  
11       invalidity and prior art and, for the most part, that's  
12       either a comparison the court will do, perhaps with the  
13       use of expert testimony. Again, it doesn't have anything  
14       to do with percipient witnesses or fact witnesses,  
15       regardless of where they may be located.

16                  In addition, your Honor, in terms of damages,  
17       many of the questions of damages other than what the  
18       sales have been for by TNT, which are primarily a  
19       documentary exercise, relate to Sensitech's operations.  
20       If it's a question of lost profits, their capacity to  
21       have sold that, to have made those products that  
22       otherwise TNT sold, their ability to market those  
23       products, all that relates to Sensitech's information,  
24       the plaintiff's information. The people that will  
25       testify about that are located in Beverly, Massachusetts.

1                   So the question of --

2                   THE COURT: They work for Sensitech. In other  
3                   words, if the case was in California and it was  
4                   necessary, Sensitech could take them to California.

5                   MR. GUTKOSKI: The management people do on the  
6                   damages question, yes, your Honor. Not all the inventors  
7                   do. In fact, Mr. Berrian himself, a co-plaintiff here,  
8                   over which, by the way, there would be no personal  
9                   jurisdiction over him in California, and that's why they  
10                  have been unable to in their retaliatory suit alleging  
11                  these patent issues as declaratory judgment actions, but  
12                  well after our patent complaint was filed, they were  
13                  unable to assert jurisdiction over Mr. Berrian. However,  
14                  he is not an employee of Sensitech. And, in fact --

15                  THE COURT: That's an interesting question. Can  
16                  the case with -- can his case be transferred to  
17                  California?

18                  MR. GUTKOSKI: Can it? Yes. Should it? No.

19                  THE COURT: I appreciate you're telling me it  
20                  can. I've been dealing with some other things too.

21                  MR. GUTKOSKI: If Mr. Berrian was the sole  
22                  owner of the patents, and he found out that TNT was  
23                  infringing his patents, and TNT had no contacts with his  
24                  home forum of Massachusetts, then he would most likely  
25                  have to go to a place where he had jurisdiction over TNT

1       in order to sue them. However, the burdens, given that  
2       he has availed himself of his home forum, as has  
3       Sensitech, given that he has chosen to sue in the place  
4       where he has suffered injury here in Massachusetts, as  
5       has Sensitech, the question of transferring his case as  
6       an individual, and the burden is on him as an individual  
7       versus a company, are obviously much different.

8                  THE COURT: I don't know that this is addressed  
9        in the papers. You're representing both plaintiffs,  
10      correct?

11                 MR. GUTKOSKI: Correct.

12                 THE COURT: Do the papers tell me who's paying  
13      you?

14                 MR. GUTKOSKI: No. That being said, your  
15      Honor, the availability of counsel is, as your Honor  
16      knows, not the only question that needs to be asked in  
17      terms of relative burdens on the parties. It is, as was  
18      noted in my brother's argument, your Honor, I believe  
19      noted by the court, the relative burdens in convenience  
20      when you've got basically one party on each side or, in  
21      this case, two versus one, two in Massachusetts, one in  
22      California, are pretty much going to wash.

23                 THE COURT: Let me ask you this, though. Do the  
24      papers tell me your relative share of the market,  
25      Sensitech's relative share of the market?

1 MR. GUTKOSKI: No, they do not.

2 THE COURT: I thought they were claiming it was  
3 about 90 percent, and they were your only competitor  
4 still doing business.

5 MR. GUTKOSKI: I believe I heard those  
6 representations today. That's not true. Those are not  
7 made in the papers. And, therefore, they, one, can't be  
8 taken as true and unrebutted for purposes of deciding  
9 this motion; and, two, I will represent to the court that  
10 we don't have 90 percent of the market, and the  
11 representations about our acquiring other competitors  
12 while Sensitech has acquired some of the competitors, the  
13 allegations, without foundation as to Sensitech's intent  
14 behind them or whether or not any of that alleged intent  
15 in any way informs their decision to bring again this  
16 garden variety against patent case against TNT, are  
17 completely untrue.

18 So, your Honor, the decision that you can make  
19 on the record before you regarding venue comes down to,  
20 as your Honor pointed out, were the people that are most  
21 important to the court to hear these matters. And,  
22 again, whether we look at the question of infringement,  
23 which is our allegation, or their likely defenses to come  
24 out in their answer, those witnesses are located here.

25 THE COURT: What are the likely defenses?

1                   MR. GUTKOSKI: That the patent is invalid,  
2                   again, requiring expert testimony, not percipient  
3                   witnesses, an analysis of prior art, and the patent is  
4                   unenforceable. What we heard about the reissue patent,  
5                   what we heard about what was and wasn't told to the  
6                   Patent Office, what was alluded to by Mr. Cislo regarding  
7                   Sensitech's motives and allegations in bringing this  
8                   complaint, all of that is going to turn on the testimony  
9                   of Sensitech's witnesses and people located here in  
10                  Massachusetts, not those in California.

11                  THE COURT: Thank you.

12                  Mr. Cislo, do you want to respond briefly?

13                  MR. CISLO: Yes, if I may, your Honor.

14                  A couple of things. One is that I believe in  
15                  the verified complaint that's attached to the second Budd  
16                  Pohle declaration --

17                  THE COURT: Hold on a second. The second one?

18                  MR. CISLO: Yes.

19                  THE COURT: What exhibit number, letter?

20                  MR. CISLO: F.

21                  THE COURT: Go ahead.

22                  MR. CISLO: I think on page 10, paragraph 23 in  
23                  its verified complaint, the allegation of the antitrust  
24                  claim is 85 to 90 percent of the sub-market for  
25                  electronic data loggers is what Sensitech controls, just

1 to dispose of that point.

2 The other thing that I'd like to point out is  
3 that the declaration that was addressed in Budd Pohle at  
4 paragraphs 13 and 19 where it was talking about this  
5 relationship with Alphas Chelsea, in each case, it's  
6 talking about basically sending a rebate check to these  
7 folks in Massachusetts for returning a piece of  
8 equipment. In other words, there is no sale of product.  
9 You might -- we may call it a relationship, but it's  
10 really simply sending a check to somebody for returning a  
11 piece of equipment, which is not an infringing action.

12 The other bigger point that I'd like to make is  
13 that defendants have pointed out and speculated as to  
14 what all these defenses might be. Right now, it's before  
15 the court as only one issue, and that is the allegation  
16 of infringement. There has been no answer yet. And  
17 that's the legal issue to be looked at, because  
18 everything else would be speculation about fraud in the  
19 Patent Office.

20 THE COURT: Well, with regard to infringement,  
21 why would the third party witnesses you were telling me  
22 about have admissible testimony?

23 MR. CISLO: Because in every single case, the  
24 third party witnesses, all located in California, will  
25 testify how they constructed, how the device functions,

1 what electronic componentry, that all has to do with the  
2 issue of infringement. The court can't determine what  
3 the meet and bounds of the patent are. They don't need  
4 all this testimony. The inventor is superfluous. We do  
5 know that Sensitech is exclusive (unintelligible). That  
6 inventor is not even relevant to these proceedings  
7 because he doesn't have any rights, in this case a  
8 royalty. But, for the most part, Sensitech is driving  
9 the vote on this. So it's all about the infringement  
10 issue. And once the court looks at the patent and  
11 construes it from file history, nothing else is really  
12 relevant because it's all intrinsic. But what is  
13 relevant is the issue of infringement. What is this  
14 component, how is it made, how is it assembled, how is it  
15 used? So --

16 THE COURT: Okay. Thank you.

17 MR. GUTKOSKI: If I could just address that one  
18 point briefly, your Honor.

19 Determining infringement involves comparisons  
20 between what the product is and the patent, how it was  
21 built, why it was built. How TNT's people believed it  
22 works or represented that it works is secondary, if not  
23 irrelevant. It is actual comparison.

24 THE COURT: Let me ask you this question. It's  
25 by no means a rhetorical question.

1                   I rarely if ever hear extrinsic evidence in  
2 connection with a Markman hearing that's usually  
3 conducted in conjunction with a motion for summary  
4 judgment because I'm focusing on the intrinsic evidence.  
5 Unless the Federal Circuit has changed its mind recently,  
6 that's what I understand I'm supposed to do. But I'm  
7 never sure that there isn't something recent I'm not up  
8 on.

9                   How do I know without getting testimony, though,  
10 what the defendant's product is for the purpose of  
11 comparison? Is their product patented?

12                  MR. GUTKOSKI: No, your Honor. For the purpose  
13 of the Markman hearing, you are correct, you're supposed  
14 to look at the intrinsic evidence, the prosecution  
15 history. So in terms -- all I was going to say was their  
16 product is irrelevant to the purposes of Markman. Once  
17 we have the patent construed, we proceed to summary  
18 judgment or trial and the purposes of infringement. Then  
19 you look at the product itself and expert testimony about  
20 -- this is an electronics product. The patent claims  
21 involved here relate to the layout of electronic  
22 components and what does what and what connects to which  
23 memory and what have you. So that's going to be the  
24 subject of expert testimony.

25                  THE COURT: For their product.

1                   MR. GUTKOSKI: Correct, for their product.

2                   THE COURT: Why does it have to be expert  
3                   testimony? It could be the people who built it. It  
4                   doesn't have to be some third party.

5                   MR. GUTKOSKI: I think there's extensive law  
6                   out there, your Honor, that says that the  
7                   characterizations of the accused infringer about the  
8                   product are not the primary concern. In fact, what the  
9                   court needs to be looking at is what the product actually  
10                  does. And that's the subject of expert testimony. In  
11                  fact, to the extent that your Honor is concerned at  
12                  Markman about not involving experts, only looking at  
13                  intrinsic testimony, the only place in the trial for the  
14                  much ballyhooed patent law expert or patent trial expert  
15                  is on the question of infringement and comparing the  
16                  accused device to the patent claims.

17                  The only other point I would make, your Honor,  
18                  is Mr. Cislo just mentioned that the inventor is  
19                  irrelevant. The inventor's testimony in terms of Markman  
20                  in terms of what he believes the patent claims to be,  
21                  correct, are not relevant. It's your own Honor's  
22                  construction. However, in terms of what their defense  
23                  is, what Mr. Cislo told us their defenses are about  
24                  whether or not this patent is unenforceable or not is  
25                  going to turn on what Mr. Berrian and his fellow